Filed 11/2/12 Kashfian v. Abrams CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANGELA KASHFIAN, Plaintiff and Appellant, v. SHIRZAD ABRAMS et al., Defendants and Respondents.	B237611 (Los Angeles County Super. Ct. No. LC089363)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Harwin, Judge. Affirmed.

Glenn A. Williams for Plaintiff and Appellant.

Hanger, Steinberg, Shapiro & Ash, Marc S. Shapiro, and Jonathan P. Cyr for Defendants and Respondents.

Plaintiff Angela Kashfian appeals the trial court's order denying her motion to set aside the dismissal of her action with prejudice. We find no abuse of discretion, and thus we affirm.

BACKGROUND

Kashfian filed the present action on April 14, 2010, against her neighbors, Shirzad and Parvin Abrams (the Abramses). The operative first amended complaint alleges that (1) a contractor hired by the Abramses entered Kashfian's property and cut down trees and shrubs on the border between Kashfian's and the Abramses's properties, and (2) without obtaining required building permits, the Abramses constructed a patio that encroaches Kashfian's property.

On June 7, 2011, Kashfian's attorney filed a motion to be relieved as counsel, and on June 9, 2011, Kashfian filed a substitution of attorney form, substituting herself in propria persona.

Kashfian represented herself at a trial setting and postmediation status conference on July 11, 2011. The Abramses's attorney said mediation had not taken place because Kashfian's attorney had withdrawn and Kashfian had not responded to letters requesting a mediation date. Kashfian told the court she had been hospitalized with a heart problem and had not been able to appear for her deposition. The following exchange then occurred:

"Mr. Cyr [respondents' counsel]: Your Honor, there's presently a motion to compel deposition on calendar. . . . Insofar as there are issues that may have prevented her from attending the deposition, . . . I would invite her to feel free to submit those [doctor's note or declaration], along with an opposition, if she so chooses.

"The Court: All right. Ma'am, you're ordered to return for the motion to compel at 8:30 on [August 8].

". . . . . ."

"Ms. Kashfian: Your Honor, um, because of the advice of my doctors and the problems I have healthwise, I'm not capable right now to pursue this case any longer. So —

"The Court: You're making a motion to dismiss?

"Ms. Kashfian: Yes.

"The Court: The matter's dismissed.

"Ms. Kashfian: I'm quitting right now on behalf of myself completely —

"The Court: All right.

"Ms. Kashfian: — from this case.

"The Court: All right.

"Ms. Kashfian: And what is important for me is just right now as what the city complied to me. I did all my efforts in order to maintain all the legal aspects to apply to the city comply that they done to me. So what is important right now is just —

"The Court: All right.

"Ms. Kashfian: — me applying to the city comply. And for the rest of the stuff, I just withdrawing for now until —

"The Court: All right. Any objection?

"Mr. Cyr: No objection, Your Honor.

"The Court: The matter is dismissed then. Good luck to you.

"Ms. Kashfian: Yes.

"Mr. Cyr: Can I seek some clarification so that I may give notice to the appropriate parties? Is this a dismissal without prejudice or with?

"The Court: With prejudice. Good luck to you, ma'am.

"Ms. Kashfian: Thank you so much, sir.

"The Court: The matter's dismissed."[1]

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[1] Defendants' counsel filed notice of entry of dismissal with prejudice the same day.

On September 8, 2011, Kashfian filed a motion pursuant to Code of Civil Procedure section 473 (section 473) to set aside the dismissal with prejudice. Her declaration in support stated as follows:

"9. . . . I did not hear, comprehend or understand that the matter would be dismissed with prejudice. I have never attended law school and was unfamiliar with the term.

"10. My words clearly indicated to the Court that my desire was to not proceed with this action at this time; but that once I was able I would bring another action for redress of my losses and damages.

"11. My stated intention was to institute an action once my health had improved and once all of my estimates were prepared so I could establish the damages that I have suffered on my property at the hands and actions of the Defendants.

"12. The Court's entry of a Dismissal with Prejudice precludes me from instituting an action with the same or similar causes of action, which was not my intention when I requested that the Court dismiss this action.

"13. I have been advised that I suffer from a hearing deficit which adversely affects my ability to hear. I thought I was able to hear the proceeding, but once I read the transcript of the proceedings I realized that my hearing is not sufficient to hear all that was stated in court that day.

"14. I seek[] to have the matter dismissed without prejudice, so that I may seek redress when is [*sic*] physically able to [proceed with] this matter."

The court denied the motion on October 5, 2011, stating: "The motion is denied. I do recall this matter. I recall what went on that day. It was clear that the plaintiff wanted to dismiss this case."

On November 23, 2011, Kashfian timely filed a notice of appeal from the order denying her motion.

DISCUSSION

Kashfian contends on appeal that she never intended to dismiss her action with prejudice and was unaware of what "with prejudice" meant when the trial court entered its order. Further, she moved promptly to set aside the dismissal, and there will be no prejudice to the Abramses if the dismissal with prejudice is set aside. She thus contends that the trial court abused its discretion in denying her motion. For the following reasons, we disagree.

Code of Civil Procedure section 473, subdivision (b) provides: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

Section 473's "'broad remedial provisions' (*Carrasco v. Craft* (1985) 164 Cal.App.3d 796, 803) are to be 'liberally applied to carry out the policy of permitting trial on the merits' (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 144, p. 736). The party seeking relief, however, bears the burden of proof in establishing a right to relief. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1205.) The burden is a ""'double'"" one: the moving party ""'must show a satisfactory excuse for his [error], and he must show diligence in making the motion after discovery of the [error].'"" (*Huh v. Wang* [(2007)] 158 Cal.App.4th 1406, 1420.) Whether the moving party has successfully carried this burden is a question entrusted in the first instance to the discretion of the trial court; its ruling will not be disturbed in the absence of a demonstrated abuse of that discretion. (*Rodriguez v. Henard* (2009) 174 Cal.App.4th 529, 534-535; *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1139-1140.)" (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1410.)

Although Kashfian has not articulated the prong of section 473 that she believes entitles her to relief, we understand her to say that her failure to request a dismissal

without prejudice (or to object to the trial court's statement that dismissal would be *with* prejudice) was attributable to a mistake in law, to wit, her mistaken belief that notwithstanding the dismissal, she would be permitted to refile her action when her health improved. While a mistake in law is a ground for relief under section 473, the "'issue of which mistake in law constitutes excusable neglect presents a question of fact. The determining factors are the reasonableness of the misconception and the justifiability of lack of determination of the correct law. [Citation.]' [Citation.] '[I]gnorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief. [Citations.]' [Citation.]" (*Robbins v. Los Angeles Unified School Dist*. (1992) 3 Cal.App.4th 313, 319.)

In the present case, the trial court either did not credit Kashfian's assertion that she was mistaken about the law, or concluded that such mistake was not excusable, or both. If the trial court found that Kashfian was not mistaken about the law—i.e., if it did not find credible her statement that she "was unfamiliar with" the term "dismissed with prejudice"—we must defer to its credibility determination. (E.g., *In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 492 ["With respect to purely factual findings, we will defer to the trial court's assessment of the parties' credibility, even though the determination was made on declarations rather than live testimony."].) Having done so, we cannot conclude that the trial court abused its discretion by denying Kashfian's section 473 motion, especially in view of her statement that she was "quitting right now on behalf of myself completely . . . from this case." ~(RT 5)~

The trial court also may have found that Kashfian's claimed mistake was not excusable. "An 'honest mistake of law' can provide 'a valid ground for relief,' at least 'where a problem is complex and debatable,' but relief may be properly denied where the record shows only 'ignorance of the law coupled with negligence in ascertaining it.'" (*Hopkins & Carley v. Gens*, *supra*, 200 Cal.App.4th at pp. 1412-1413.) The meaning of "with prejudice" is neither complex nor debatable, and the trial court did not abuse its discretion in so concluding. (See *Robbins v. Los Angeles Unified School Dist*., *supra*, 3 Cal.App.4th at p. 319 [trial court did not abuse its discretion by denying pro se plaintiffs'

section 473 motion: "Appellants claim the court abused its discretion because their failure was attributable to a mistake in law, to wit, their belief that the motion to dismiss had become moot once respondents demurred to their belatedly filed first amended complaint. . . . In the present case, the trial court determined by implication that the claimed mistake in law was insufficient to constitute excusable neglect when it concluded that appellants' failure to oppose respondents' motion to dismiss was 'inexcusable.' Inasmuch as appellants apparently made no effort to ascertain the validity of their erroneous belief regarding mootness, we find no basis to reverse that determination."].)

We recognize that Kashfian appeared without legal counsel and is not schooled in the law. However, "'we are unable to ignore rules of procedure just because we are aware of that fact. "When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys [citations]. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney [citation]." [Citations.]' (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) In other words, when a litigant accepts the risks of proceeding without counsel, he or she is stuck with the outcome, and has no greater opportunity to cast off an unfavorable judgment than he or she would if represented by counsel." (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1267; see also *Hopkins & Carley v. Gens*, *supra*, 200 Cal.App.4th at pp. 1413-1414 ["One who voluntarily represents himself 'is not, for that reason, entitled to any more (or less) consideration than a lawyer.'"].)

In view of the trial court's implied factual findings, Kashfian demonstrated, at best, a change of heart sometime after the hearing. Such a change is not a proper basis for relief under section 473. (See *Price v. Hibbs* (1964) 225 Cal.App.2d 209, 217 [rejecting "change of mind" as a proper basis for relief under section 473].)

DISPOSITION

The order denying Kashfian's section 473 motion is affirmed. Respondents are awarded their costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.